

Service Date: June 3, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Application)	TRANSPORTATION DIVISION
of Francis W. Morris, dba Pete's)	
Towing & Repair, Lincoln, Montana,)	DOCKET NO. T-9044
for a Class B Certificate of)	
Public Convenience and Necessity.)	ORDER NO. 5784

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FINAL ORDER

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APPEARANCES

FOR THE APPLICANT:

Paul T. Keller, Keller, Reynolds, Drake, Sternhagen and
Johnson, 38 South Last Chance Gulch, Helena, Montana 59601

FOR THE PROTESTANT:

David L. Jackson, Jackson, Murdo, Grant and Larsen, P.C., 203
North Ewing, Helena, Montana 59601

FOR THE COMMISSION:

Geralyn Driscoll, Staff Attorney, 2701 Prospect Avenue,
Helena, Montana 59620-2601

BEFORE:

HOWARD L. ELLIS, Commissioner & Hearing Examiner

BACKGROUND

On January 24, 1987, Francis W. Morris, d/b/a Pete's Towing and Repair (Applicant), Lincoln, Montana, applied to the Montana Public Service Commission (Commission) for Class B authority to transport heavy equipment between all points and places in the following counties: Missoula, Lewis & Clark, Powell, and Granite. The application was protested by Monty Peterson, d/b/a Peterson Trucking, Inc. (Protestant).

After proper public notice a hearing was held on April 7, 1987. The Applicant and the Protestant were present and represented by attorneys. Pursuant to ARM 38.2.4802(2), all parties stipulated to a final order in this matter. At the request of the parties attorneys, a transcript of the hearing was made and a briefing schedule was set. Briefs were received June 4, 1987.

SUMMARY OF TESTIMONYApplicant's Testimony

Francis W. Morris, owner of Pete's Towing and Repair, testified. He has operated a machine shop, welding service and towing service in Lincoln, Montana for the past 20 years. His equipment includes a Kenworth tractor, a lowboy and three wreckers.

He repairs heavy equipment such as large cats, skidders and loaders in the Lincoln area. He offers mechanic service in approximately a hundred mile area of Lincoln and has repaired the equipment of all the shipper witnesses testifying on his behalf.

In his opinion, there is a need for hauling heavy equipment to his shop in Lincoln, Montana.

On cross-examination Mr. Morris testified that he has moved heavy equipment in the past for various customers, charging them an hourly rate of \$45. He estimates that he has been offering this service for approximately three years and during this time has moved approximately 40-50 loads.

Mr. Morris testified that he has never been ticketed for operating without authority but the gross vehicle weights section of the Highway Department has stopped him in the past for being overweight and overwidth. The largest piece of equipment he has moved in the last three years is a D-6. The smallest piece is a 540 John Deere. He testified that in addition to his 1953 Kenworth modified with 1978 parts, he owns a Tandem lowboy with a 30 ton capacity. He has used this to haul a D-6. Mr. Morris testified that the transportation he is interested in doing is primarily related to his repair business.

Shipper Witnesses

The Applicant called the following shipper witnesses:
Alvin Ray, George Anderson, Leland DenBoer, Larry Gaalswyk and William Park.

Alvin Ray, Box 848, Lincoln, Montana, testified. Mr. Ray is a logger who owns three D-6 caterpillars. He generally operates in Powell and Lewis and Clark counties and needs a carrier to haul his logging equipment to job sites. Usually his work is in a 60-70 mile radius of Lincoln. He may have as many as three jobs going at one time scattered throughout that area. In the past, Mr. Morris has done repair work for him and some hauling also. He testified that the Applicant's service is needed to haul equipment to Missoula. Currently, if a lowboy is brought from Missoula, the shipper is charged deadhead miles from Missoula to the job.

On cross-examination, Mr. Ray testified that in the last six years he has used Mr. Morris to haul his equipment to Missoula three times. He stated that he is not familiar with the service of the Protestant. He has done business with Terry French, who operates out of Helena. He testified that the convenience of having a hauler near his operations is very valuable to him. There are times when he is able to give at least a weeks notice before transportation service is needed; other times, he may need the transportation within as short as 24 hours.

George Anderson, Lincoln, Montana, testified. He is a logger based in Lincoln, Montana. He has two cats, five skidders, two 410 shovels, and a PHN Mighty Mite and a Meyers shovel. He estimates that in one year his two outfits may move seven or eight times. He has used the Applicant many times to move his equipment. Mr. Morris has also done some mechanical work for him.

Mr. Anderson testified that when equipment is broken he needs it hauled to Missoula because his repair work is done there. He estimates that he makes five or six trips a year. He supports Mr. Morris' application because of the convenience of having a mover available in Lincoln. Mr. Anderson also testified about a service problem his operation had with Peterson Trucking, the

Protestant.

Leland DenBoer, Lincoln, Montana, testified. Mr. DenBoer is a logger who moves a skidder approximately six times a year and has used the Applicant. He prefers Mr. Morris because the service is available quickly in Lincoln.

Larry Gaalswyk, Lincoln, Montana, testified. Mr. Gaalswyk is a logger whose work is usually in a 100 mile radius of Lincoln. Applicant has moved his International TD-8 cat and his Allis Chalmers HD-20 approximately six times a year. He also occasionally has equipment moved to Missoula. He prefers the Applicant because Mr. Morris can do both mechanical work and hauling for him.

On cross-examination he testified that on many short local hauls it is difficult to give more than a couple hours notice. On logging hauls it varies between 12 and 24 hours.

William Park, Drummond, Montana, testified. Mr. Park is a logger with operations throughout western Montana. He has used the Applicant to do mechanic work, welding, and hauling for his logging business. His logging outfit owns a tilt bed trailer that is used on occasion for hauling small equipment, but it would be convenient to have a certified hauler out of Lincoln.

On cross-examination he testified that he has used the Protestant, Peterson Trucking, in the past. Mr. Park prefers not to use Peterson Trucking in the Lincoln area because he has to give more notice. A hauler in the Lincoln area would be convenient because he believes he could give much shorter notice. He estimates that he makes six or eight moves in the Lincoln area in a year.

The Applicant rested.

The Protestant moved to dismiss the application on the grounds that the Applicant's testimony raised a serious question of

fitness: the Applicant has conducted illegal moves for a substantial period of time. The application's support rested solely on illegal activity conducted by a person now seeking appropriate authority from the Public Service Commission. The Protestant also moved for dismissal because the Applicant has made no showing of public convenience and necessity in the territory sought in the application. The Commission took the motion under advisement noting that the hearing was conducted by a hearing officer who does not have the authority to grant a motion to dismiss without a quorum.

Protestant's Witnesses

Protestant called Monty Petersen, Missoula, Montana, the president of Peterson Trucking, Inc. Mr. Petersen is involved in heavy hauling out of Missoula, Montana and has been in the trucking business since 1962. Among other activities, Petersen Trucking is engaged in log hauling and hauling heavy machinery for the logging industry.

Mr. Petersen sponsored Protestant's Exhibit No. 1, a copy of Protestant's authority to operate in Montana. Mr. Petersen testified that Peterson Trucking has a tariff filed with the Commission and is prepared to serve any and all the persons testifying as shipper witnesses on behalf of the Applicant.

Mr. Petersen sponsored Protestant's Exhibit No. 2, which is entitled, "Petersen Trucking, Inc. Trial Balance Worksheet." This exhibit is titled an equipment schedule of equipment owned by Petersen Trucking.

Petersen Trucking does its own maintenance in its shop in Missoula. It owns three pieces of power equipment and four trailers with various pieces of equipment for the trailers. The equipment is designed for a maximum weight of 135,000 pounds.

Petersen Trucking would be able to haul all of the equipment described by the shipper witnesses.

Mr. Petersen commented on the Applicant's testimony that his trailer has the capacity to haul 30 tons. It is Mr. Petersen's experience that the largest piece of equipment that should be carried on that type of equipment is a D-7. If you attempt to haul a D-8 or large, it requires special equipment.

Petersen Trucking's principal terminal location is Missoula, Montana. There is a shop and yard space at the terminal.

Petersen's equipment permits them to load and unload in almost any terrain and the company is familiar with the repair shops in Missoula.

Mr. Petersen testified that Petersen Trucking advertises in the Yellow Pages and hands out business cards. He estimates that equipment is in the Lincoln area approximately twice a month.

The company has never considered stationing equipment in Lincoln, although, if there were enough work there, Petersen Trucking would.

In his opinion, the work in the Lincoln area is slowing down. His business does not have as many calls in that area as compared with the past three or four years.

Petersen Trucking has four employees involved in machinery hauling. Mr. Petersen's company maintains 24-hour telephone service and radio contact with most of its trucks. He attempts to accommodate the schedules of his customers. Most of the scheduling occurs in the evening when the loggers get in from work. Generally, the lead time is overnight. Most of the time they are able to satisfy the scheduling problems of the customers.

Usually the company attempts to arrange for additional pick ups or additional loads on the run from the Lincoln area. It

is in radio contact with its drivers and can reach into the Ovando area with the private radio station. The company attempts to batch loads for Lincoln because that is less costly for customers.

Mr. Petersen estimates that if this new authority is granted it could result in a loss of traffic and a loss of revenue to Petersen Trucking. In that case, the company would seek revenue from further distances and it would make overnight service more difficult to provide.

On cross-examination, Mr. Petersen testified that it takes approximately an hour and a half each way from Missoula to Lincoln. Mr. Petersen testified that in the Lincoln area Peterson Trucking transports on a mileage basis. If there is no load going to Lincoln there is approximately 80 miles of deadhead charge from Missoula.

Scott Petersen, Vice President of Petersen Trucking, testified. He has worked in the family business since 1978. He is familiar with many of the Applicant's shipper witnesses and, in his opinion, Petersen Trucking is ready willing and able to meet their transportation needs.

He stated that the logging industry is a significant part of Petersen Trucking's work. Additional authority would adversely affect its business and would harm customers in Western Montana.

Mr. Petersen stated that the problem of deadhead miles is not solved by authorizing another carrier. Unless a Lincoln carrier could schedule a load into Missoula, there will be deadhead miles for that carrier also.

FINDINGS, DISCUSSION AND ANALYSIS

A party wanting to transport persons or property for hire on any public highway in Montana must first obtain a certificate of public convenience and necessity from this Commission. Sections 69-

12-311, 312, and 313, MCA. To determine if a certificate should be granted the Commission must determine, one, whether the applicant is fit, willing and able to offer the service and, two, whether public convenience and necessity requires that the authority be granted.

Fitness. To determine if an Applicant is fit, willing, and able to provide service, several factors are considered including Applicant's financial condition, experience, intention to perform the service sought, adequacy of equipment, and whether this Applicant has in the past performed illegal operations. This application does not present an issue with respect to the first three factors. However, the fourth and fifth factors -- adequacy of equipment and past illegal operations -- were raised as issues during the hearing.

Equipment. The Protestant testified that in his opinion the Applicant's equipment was not adequate for D-8 size and larger equipment (TR. p. 69). Because this application is denied on other grounds, the Commission makes no finding on this except to note that the issue of the applicant's fitness to haul very large equipment was raised during the hearing.

Illegal Activity. Evidence was introduced at this hearing establishing that Applicant has occasionally transported heavy equipment without authority in violation of Montana statutes and Commission rules. (See, for example, TR. pp. 11 and 12.) Although the Commission considers illegal activities a serious matter, it does not take the position that illegal operations are automatic grounds for denial of an application. Rather, we consider past willful misconduct as one element in assessing an applicant's present and future fitness. This position is in accord with that taken by the I.C.C. See Armored Carrier Corporation v. United States, 260 F.Supp. 612, 615 (1966). In some cases the

I.C.C. has found willful illegality a bar to a grant of authority.

But in other cases, with different facts, it has found the reverse. See e.g. B.D.C. Corporation, Extension-Five Counties, 99 M.C.C. 126 (1965); and Howard Sober, Inc., Extension-Various States, 83 M.C.C. 361 (1960).

In determining the fitness of an applicant who has operated illegally two considerations are relevant: 1) the severity and circumstances of the illegal conduct and 2) the public interest in the prospective service. To overcome illegal operations and receive authority an Applicant must make a clear, if not overwhelming, case for public convenience and necessity.

In this case Applicant, on the record, stated that there were instances when he transported heavy equipment without authority. Many of the applicants shipper witnesses also testified that they were supporting this application because they were pleased with the his past services, which were provided without authority. As discussed below, in this case the evidence of illegal activity does not establish that the Applicant is unfit but, in light of the illegal activity, shipper demand was insufficient to establish public need for authorizing this Applicant.

Public Convenience and Necessity. In all applications the Commission must consider whether public convenience and necessity require that we grant the requested authority. Section 69-12-323(2), MCA, provides in part:

...In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the

effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

To determine if public convenience and necessity require the authority the Commission must consider whether there is shipper demand and need for the service and, if there is need, whether it can be met by existing carriers. These questions were best stated in the case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

Applicant introduced five shipper witnesses in support of its application. These witnesses expressed preference for Applicant primarily on the basis of wanting a heavy equipment carrier based in Lincoln. The Protestant, an existing carrier with authority to haul heavy equipment, is based in Missoula.

Protestant's evidence on the record establishes that he is fit, willing and able to meet the current demand for services.

A new carrier will not serve a useful public purpose. Public

demand or need can and will be satisfied by the existing certified carrier. Granting a new authority would be contrary to the public interest.

Some of the supporting testimony was based on the shippers' desire to continue to use the Applicant's services as a mechanic. The Commission notes that Mr. Morris may tow abandoned, wrecked or disabled vehicles to his repair shop without an authority from this Commission. (See < 69-12-102(1)(f), MCA.)

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. All motions not ruled on are denied.

4. Section 69-12-323(2), MCA, requires that public convenience and necessity be shown prior to the granting of operating authority.

5. Following hearing on the application and based upon the evidence in the record, the Commission concludes that public convenience and necessity do not require the grant of the application for authority.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No. T-9044 be denied.

Done and Dated this 3rd day of June, 1987 by a vote of
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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.